IN THE
SUPREME COURT OF THE STATE OF MICHIGAN

On Appeal From The Michigan Court Of Appeals
Borello, P.J., and White and Smolenski, J.J.

MILISSA MCCLEMENTS,

Plaintiff-Appellee/Cross-Appellant,

vs.

FORD MOTOR COMPANY

Defendant-Appellant/Cross-Appellee.

Supreme Court No. 126276

Court of Appeals No. 243764

Oakland County Circuit Court
No. 01-034444-CL
Hon. Wendy L. Potts

BRIEF ON APPEAL – CROSS-APPELLEE
PROOF OF SERVICE

ORAL ARGUMENT REQUESTED

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COUNTER-STATEMENT OF BASIS OF JURISDICTION

This Court has jurisdiction pursuant to MCL 600.215(3); MSA 27A.215(3). See also MCR 7.301(A)(2), MCR 7.302(G)(3).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Whether The Trial Court Properly Dismissed An Elliott-Larsen Claim Under The Employment Section Of That Act Where The Plaintiff Was Not Employed By The Defendant-Employer And Where The Defendant-Employer Did Not Control The Terms And Conditions Of Plaintiff's Employment.

Answer of the Court of Appeals: "Yes"

Answer of the Circuit Court: "Yes"

Answer of Cross-Appellee: "Yes"

II. Whether The Trial Court Properly Dismissed A Hostile Environment Sexual Harassment Claim Where The Alleged Conduct Was Unwitnessed And Neither The Plaintiff Nor Anyone Else Reported The Alleged Conduct.

Answer of the Court of Appeals: "Yes"

Answer of the Circuit Court: "Yes"

Answer of Cross-Appellee: "Yes"

I. INTRODUCTION

In her cross-appeal, Plaintiff/Cross-Appellant Milissa McClements ("Plaintiff") asks this Court to take the unprecedented step of imposing liability for employment discrimination on Defendant/Cross-Appellee Ford Motor Company ("Ford"), even though Ford was never Plaintiff's employer and never in a position to make decisions about her employment. According to Plaintiff, all she need prove in order to sue Ford under the Elliott-Larsen Civil Rights Act ("Elliott-Larsen") is that Ford is an employer of anyone. What's more, Plaintiff characterizes her unprecedented position as one accepted "unanimously" by the federal courts, asserting that if this Court is to decide against her, it would "become the first to so hold." (Plaintiff's Brief at 18, 20). Plaintiff's attempts to pressure the Court into agreeing with her did not work with the trial court or the Court of Appeals. Plaintiff's arguments are no more convincing here.

Convincing this Court that Plaintiff has standing to bring an Elliott-Larsen claim against Ford is not the only insurmountable obstacle facing Plaintiff. Not only was Plaintiff not employed by Ford or any entity over which Ford exercised control, Plaintiff never complained (either to Ford or her own employer) about the alleged harassment she now asserts. Rather, three years after the fact, Plaintiff announced to Ford through litigation that a (by then former) Ford superintendent, Daniel Bennett ("Mr. Bennett"), had twice entered Plaintiff's employer's premises where he kissed or attempted to kiss her. Her arguments that her lawsuit or supposed "notice" by others provided notice that she was being sexually harassed are not only factually hollow, they are wrong as a matter of law.

Plaintiff tries to obscure her legal and factual deficiencies by manipulating and misstating the factual record. She also attempts to blur the applicable legal standards

by interchanging direct liability principles with those underlying *respondent superior* liability. Because Plaintiff seeks a gross misapplication and distortion of firmly entrenched legal principles, her cross-appeal should be rejected.

II. COUNTER-STATEMENT OF THE CASE

Plaintiff is, of course, wrong in asserting that this Court would be "the first" to reject her position that Elliott-Larsen permits her to sue an employer other than her own. Other courts have routinely rejected the argument Plaintiff makes here, at least in the absence of conformity with either the "economic reality" or "control" test. Moreover, at least two courts -- the trial court and the Court of Appeals panel – expressly rejected the very arguments Plaintiff presents here.

This court should reject Plaintiff's position as well. It is not supported by the "plain and ordinary" language of the statute (despite Plaintiff's contrary suggestion), it is not supported by the opinions of this Court or any other court, and it would be folly in terms of its public policy ramifications.

Plaintiff takes great liberty in setting forth "facts" that are not supported by the trial court record. Much of what is represented as fact is the gross speculation and hyperbole of Plaintiff's counsel, which is not fact and cannot and did not carry Plaintiff's burden at the summary disposition stage. Plaintiff also attempts to improperly supplement the trial court record, citing only to her appendix in an attempt to obscure her failure to include certain documents or testimony in opposing summary disposition. In any event, Ford will summarize here -- supported by the record and sanitized of Plaintiff's sensationalism -- those facts that are pertinent to Plaintiff's Elliott-Larsen claim.

A. Factual Background

On or about January 15, 1998, Plaintiff applied for work with AVI Food Systems ("AVI"). AVI has a contractual relationship with Ford to operate the cafeterias at Ford's Wixom Assembly Plant. (Appeal Apx 215a, 233a, 239a, 244a).[1] While Plaintiff completed the AVI application on the grounds of the Wixom Plant, Plaintiff was applying for whatever job AVI might have available, whether it be at the Wixom Plant or at other non-Ford facilities serviced by AVI in the same general vicinity. Plaintiff specifically understood that she was applying to work for AVI, not Ford. (Appeal Apx 233a-234a, 236a-239a, 244a). Plaintiff also understood that, in order to apply for a job at Ford, she had to take and pass a skills test, something she did not do. Plaintiff has at no time sought employment with Ford. (Appeal Apx 225a-228a).

AVI offered Plaintiff a job as a cashier and Plaintiff began working in the AVI cafeterias at the Wixom Plant on March 9, 1998. (Appeal Apx 208a-209a, 218a). As of June 6, 1998, Plaintiff completed her probationary period, at which point she gained the protections offered by her collective bargaining representative, Union Local 1064, AFL-CIO, pursuant to a contract negotiated between AVI and Local 1064. (Appeal Apx 173a, 209a, 212a, 221a-224a, 249a-274a). At all times during Plaintiff's employment, AVI has paid her wages, provided her benefits, assigned her job duties, job location and job shifts, and disciplined her when AVI decided discipline was warranted. (Appeal Apx 167a-168a, 209a-214a, 217a-218a; Cross-Appeal Apx 80a, 1b-5b, 9b-30b, 32b-33b, 36b-37b). Also, at all times, AVI controlled access to Plaintiff's work areas, prohibiting

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[1] References to "Appeal Apx ___" are to the Appendix to Brief on Appeal-Appellant, filed with the Court on February 22, 2005. Citations to cross-appeal appendices are designated as "Cross-Appeal Apx __."

non-AVI employees (including Ford employees) from entering the cafeterias at any time other than scheduled break times and from entering non-customer areas (kitchens and stockrooms) at any time. (Appeal Apx 178a-186a, 238a-239a; Cross Appeal Apx 22b-23b). AVI also has a policy and procedure for investigating alleged sexual harassment, whether the accused is an AVI or non-AVI employee. (Appeal Apx 198a, 234a-236a, 243a). Within a month of beginning AVI employment, Plaintiff used this procedure to submit a statement detailing alleged sexual harassment by a non-AVI employee. Following AVI's investigation, AVI had this non-AVI employee permanently removed from its premises. (Appeal Apx 240a-242a, 278a-280a; Cross Apx 34b-35b).

A few months later, at some "undetermined" time in fall 1998, Mr. Bennett, then a Ford Superintendent, pleasantly chatted with Plaintiff at her cashier station in Wixom Plant Café 2 on three or four occasions, asking Plaintiff to meet him after work at a Taco Bell.[2] Plaintiff was pleasant in return, but declined Mr. Bennett's invitations. (Appeal Apx 189a-190a, 199a-205a). Shortly thereafter, Mr. Bennett allegedly entered an AVI stockroom when Café 2 was closed, came up behind Plaintiff, and kissed her. A few days later, Mr. Bennett again allegedly entered an AVI stockroom or kitchen when the cafeteria was closed and attempted to kiss Plaintiff, but she succeeded in pushing him away. All of these events transpired during a three or four-week period in fall 1998 and Plaintiff had no contact with Mr. Bennett other than during this brief period. (Appeal Apx 187a-188a, 208a).[3]

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[2] Mr. Bennett vehemently denies any such invitations or any improper conduct toward Plaintiff. However, for purposes of the motion for summary disposition only, Ford treated Plaintiff's allegations as if they were true.

[3] Plaintiff is uncertain about the timing and sequence of these alleged events. She "believed" the three-week encounter was over prior to emergency surgery she had in

Plaintiff did not complain to either AVI or Ford about Mr. Bennett. Both AVI and Ford first learned of Plaintiff's allegations in approximately August 2001, in connection with this lawsuit. (Appeal Apx 175a-177a, 193a-197a, 393a). At that time, despite Plaintiff's belated notice, AVI followed its policy and procedures prohibiting sexual harassment, undertaking an investigation into Plaintiff's allegations. (Appeal Apx 175a-177a, 229a-232a, 275a). By that time, Mr. Bennett had not had any contact with Plaintiff in three years and had not worked at the Wixom Plant (or any other Ford facility) for over a year. (Appeal Apx 199a).

B. Proceedings In The Circuit Court

With respect to Plaintiff's Elliott-Larsen claim, the trial court (the Honorable Wendy L. Potts) rejected Plaintiff's contention that she had standing to sue Ford under Elliott-Larsen, holding that Plaintiff had to prove at least a quasi-employment relationship under the "economic reality" test. (Appeal Apx 7a, 13a). The trial court further rejected Plaintiff's Elliott-Larsen claim because Plaintiff failed to provide evidence of actual or constructive notice that she was being subjected to a hostile work environment. In this regard, the trial court expressly considered Plaintiff's assertion that alleged reports by a Ford hourly worker, Justine Maldonado, in the same general timeframe, put Ford on notice with respect to Plaintiff. Ms. Maldonado's alleged reports, held the trial court, were to an uncle and a friend, not to Mr. Bennett's "higher management." Furthermore, at Ms. Maldonado's express insistence, the alleged

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November 1998, but "seemed to remember" the events happening closer to Thanksgiving. She is not even sure whether the alleged Taco Bell invitations happened before or after the alleged kiss and attempted kiss. (Appeal Apx 166a-167a, 189a-193a, 206a, 208a, 216a, 246a-248a, 275a, 288a, 393a). What can safely be concluded is that Plaintiff can do no more than speculate as to timing, apart from her "fall of 1998" generalization.

reports were not for the purpose of making a complaint or invoking Ford's anti-harassment policy. Finally, the trial court held that Ms. Maldonado's alleged reports about her own supposed situation suggested nothing about Plaintiff and her brief unwitnessed alleged encounters with Mr. Bennett. (Appeal Apx 14a-15a). Having so ruled, the trial court did not address Ford's argument that one kiss and one attempted kiss spanning a three-week period were insufficient to substantially alter Plaintiff's employment as a matter of law.

C. Proceedings In The Court of Appeals

In a per curiam unpublished opinion, the Court of Appeals (Borello, P.J., White and Smolenski, J.J.) similarly rejected Plaintiff's Elliott-Larsen claim. Relying on this Court's opinion in Chambers v Trettco Inc, 463 Mich 297; 614 NW2d 910 (2000) and the "economic reality" test, the Court of Appeals panel agreed that there must be an employment relationship – at least one supported by economic reality – before an Elliott-Larsen claim may be maintained. Having determined Plaintiff did not have standing to sue Ford under Elliott-Larsen, the panel did not address Plaintiff's "contention that the trial court erred in granting summary judgment . . . because Ford ignored notices that Bennett was sexually harassing women." (Appeal Apx 21a).

III. ANALYSIS

Ford and Mr. Bennett brought a joint motion for summary disposition pursuant to MCR 2.116 (C)(8) and (C)(10).[4] With respect to Plaintiff's Elliott-Larsen claim, her failures of proof included, *inter alia*, the absence of any employment relationship

[4] Plaintiff named both Ford and Mr. Bennett as Defendants with respect to her Elliott-Larsen claim. The Court of Appeals affirmed Mr. Bennett's dismissal, a ruling that Plaintiff did not attempt to appeal to this Court.

between Plaintiff and Ford, as well as her failure to report Mr. Bennett's alleged sexual harassment to Ford or even to AVI. For all of these reasons, the trial court granted the joint motion for summary disposition on Plaintiff's Elliott-Larsen claim, a ruling this Court reviews *de novo*. Maiden v Rozwood, 461 Mich 109, 118; 597 NW2d 817 (1999).

A. The Statutory Language -- Read In Its Entirety -- Does Not Support Plaintiff's Claim That A Non-Employee May Sue An Employer Under Elliott-Larsen.

Plaintiff claims she may bring an Elliott-Larsen claim against Ford even though she admittedly has never been a Ford employee or even an applicant for Ford employment. For this proposition, Plaintiff relies primarily on the "plain and ordinary meaning" of Section 202 of Elliott-Larsen, entitled "Employer; prohibited acts." Because Plaintiff relies on the "plain and ordinary meaning" of this section, the section is set forth here in its entirety. Read in its entirety, it does not support Plaintiff's position:

> (1) An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.
>
> (b) Limit, segregate, or classify an employee or applicant for employment in a way that deprives or tends to deprive the employee or applicant of an employment opportunity, or otherwise adversely affects the status of an employee or applicant because of religion, race, color, national origin, age, sex, height, weight, or marital status.
>
> (c) Segregate, classify, or otherwise discriminate against a person on the basis of sex with respect to a term, condition, or privilege of employment, including, but not limited to, a benefit plan or system.
>
> (d) Until January 1, 1994, require an employee of an institution of higher education who is serving under a contract of unlimited tenure, or similar arrangement providing

> for unlimited tenure, to retire from employment on the basis of the employee's age. As used in this subdivision, "institution of higher education" means a public or private university, college, community college, or junior college located in this state.
>
> (2) This section shall not be construed to prohibit the establishment or implementation of a bona fide retirement policy or system that is not a subterfuge to evade the purposes of this section.
>
> (3) This section does not apply to the employment of an individual by his or her parent, spouse, or child.

MCL 37.2202; MSA 3.548(202).

The "plain and ordinary meaning" of those statutory terms chosen by the legislature in Section 202 is certainly a component of the analysis a court must undertake in construing statutory language. As this Court has held,

> This Court's primary task in construing a statute is to discern and give effect to the intent of the Legislature. Murphy v Michigan Bell Tel Co, 447 Mich 93, 98; 523 NW2d 310 (1994). "The words of a statute provide 'the most reliable evidence of [the Legislature's] intent . . . '" Sun Valley Foods Co v Ward, 460 Mich 230, 236; 596 NW2d 119 (1999), quoting United States v Turkette, 452 US 576, 593; 101 S Ct 2524; 69 L Ed2d 246 (1981). In discerning legislative intent, a court must "give effect to every word, phrase, and clause in a statute . . . ." State Farm Fire & Cas Co v Old Republic Ins Co, 466 Mich 142, 146; 644 NW2d 715 (2002). The Court must consider "both the plain meaning of the critical word or phrase as well as 'its placement and purpose in the statutory scheme.'" Sun Valley, supra 460 Mich at 237, quoting Bailey v United States, 516 US 137, 145; 116 S Ct 501; 133 L Ed2d 472 (1995). "The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended." Sun Valley, supra, 460 Mich at 237. "If the language of a statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written." Id at 236.

Shinholster v Annapolis Hosp, 471 Mich 540, 548-549; 685 NW2d 275 (2004).

Giving effect to every statutory term, in light of both plain meaning and "placement and purpose in the statutory scheme," it is abundantly clear that the legislature intended in Section 202 that there be some sort of "employment" relationship – current, former, or at least contemplated -- between the employee and the "employer" accused of violating Section 202. The legislature prohibited discrimination "with respect to employment, compensation, or a term, condition, or privilege of employment." Section 202; MCL 37.2202(1)(a); MSA 3.548(202)(1)(a) (emphasis added). Similarly, the legislature prohibited classifications that would deprive an "employee or applicant of an employment opportunity." Section 202(1)(b); MCL 37.2202(1)(b); MSA 3.548(202)(1)(b)(emphasis added). The legislature also prohibited classifications based on gender "with respect to a term, condition or privilege of employment, including . . . a benefit system or plan." Section 202(1)(c); MCL 37.2202(1)(c); MSA 3.548(1)(c) (emphasis added). While the employment relationship in question in a particular instance may be one of active employee to employer, or one of applicant or recruit to employer, Section 202(1)(a), (b); MCL 37.2202(1)(a), (b); MSA 3.548(202)(1)(a),(b), or one of retiree or employee's spouse or dependent to employer, Section 202(1)(c),(d), MCL 37.2202(1)(c), (d); MSA 3.548(202)(1)(c), (d), at the very least, the employer must be in a position of control over the employee's, applicant's, or recruit's "term[s], condition[s], or privilege[s] of employment." Section 202(1)(a), (b); MCL 37.2202(1)(a), (b); MSA 3.548(202)(1)(a), (b) (emphasis added).

In light of the statutory language, it should be no surprise that, in cases spanning more than 15 years, the Court of Appeals has repeatedly held that a plaintiff bringing an Elliott-Larsen claim against an employer must be an employee of the employer, at least

in terms of either the "economic reality" or "control" test. See e.g. McCarthy v State Farm Ins Co, 170 Mich App 451, 454-455; 428 NW2d 692 (1988) (individual bringing sexual harassment claim under Elliott-Larsen must demonstrate employment relationship pursuant to "economic reality" test, which examines who controlled employee's duties, who paid her wages, who could hire and fire her, and who was responsible for disciplining her). Accord, Ashker v Ford Motor Co, 245 Mich App 9, 15; 627 NW2d 1 (2001); Seabrook v Michigan Nat'l Corp, 206 Mich App 314, 316; 520 NW2d 650 (1994). See also, Jubenville v Michigan Dep't of Corrections, No 234352 (Mich Ct App, December 20, 2002) (2002 WL 31956493) (applying economic reality test to reject argument that MDOC contractor's employee could sue MDOC over MDOC policy that resulted in plaintiff's transfer; plaintiff's argument that Elliott-Larsen, because it protects "individuals," does not require employer-employee relationship is without merit).

This Court first recognized the "control test" in Janik v Ford Motor Co, 180 Mich 557; 147 NW 510 (1914) in the context of a loaned employee. The standard under the control test is that liability rests with the party or parties who have the right of control over the loaned employee with respect to his assigned work. Id, 180 Mich at 562. Accord, Hoffman v JDM Assoc, 213 Mich App 466, 468-469; 540 NW2d 689 (1995). The Court of Appeals has since applied this test to Elliott-Larsen and other employment discrimination claims where liability is premised on *respondeat superior* principles. For example, in Chiles v Machine Shop Inc, 238 Mich App 462; 606 NW2d 398 (1999), the Court of Appeals held, with respect to a loaned employee arguably employed by two affiliated companies, that "liability is . . . dependent . . . on the ability to adversely affect

the terms and conditions of an individual's employment or potential employment." Id, 238 Mich App at 468. With regard to "potential employment," the court opined that it meant a discriminatory failure to hire. Under these circumstances, the Chiles court held the plaintiff could sue the company that actually retained the authority to control his employment, including hiring, firing, and promotion decisions, regardless of which company paid him. Id at 467-468.[5] See also Ashker v Ford Motor Co, supra, 245 Mich App at 13-15 (the law looks to the economic realty test when the question is direct liability, and to the control test when the plaintiff is attempting to proceed under a *respondeat superior* theory); Norris v State Farm Fire & Cas Co, 229 Mich App 231, 239; 581 NW2d 746 (1998) (the question under the control test is whether the non-employer controls employment decisions of the acknowledged employer).

Plaintiff admits she was not Ford's employee, under the economic reality test, the control test -- or otherwise. She admits Ford did not control her job duties, pay her wages, discipline her, or hire or fire her. (Plaintiff's Brief at 14-15). Instead, she takes issue with the Court of Appeals' longstanding requirement of an employment relationship to argue that she need prove no more than that she was an "individual" or a "person" because that is all Section 202 requires. According to Plaintiff, "the plain and ordinary meaning of 'individual' and 'person' . . . makes it clear that Ford – 'an employer' – may not discriminate against [Plaintiff] – 'an individual' – with regard to the terms, conditions and privileges of her employment." (Plaintiff's Brief at 16) (emphasis by Plaintiff). Stated differently, whether Ford had any control over Plaintiff's employment,

[5] The Chiles panel also analyzed the plaintiff's employment under the economic reality test and determined the alleged "non-employer" was also the plaintiff's employer as a matter of economic reality. Id at 467-468.

under an economic reality test or any other test, is "irrelevant." All Plaintiff need show, according to Plaintiff, was that Mr. Bennett, the individual who allegedly kissed Plaintiff in an AVI storeroom or kitchen, "was indisputably an employee of Ford." (Plaintiff's Brief at 15).

There are at least two fallacies in Plaintiff's "plain and ordinary meaning" argument. First, Plaintiff's "plain and ordinary meaning" selects only those statutory terms that suit her purpose and reads them out of context, paying no attention to their "placement and purpose in the statutory scheme." Shinholster, supra, 471 Mich at 548-549. Adopting a hypothetical using Plaintiff's interpretation of "plain meaning," if Ford offered factory discounts on its vehicles to a certain supplier, a female employee of the supplier who believed she received a lesser vehicle for her company car than her male counterpart should be able to bring an Elliott-Larsen claim against Ford. After all, Ford is an "employer," the supplier's employee is an "individual" and a company car can be a "privilege of employment." Nothing in the structure or content of Elliott-Larsen, under a "plain and ordinary meaning" analysis or otherwise, suggests the legislature contemplated such an attenuated relationship.

Plaintiff's contentions demonstrate how out of context her "plain and ordinary meaning" analysis is. For example, Plaintiff relies on the plain and ordinary meaning of the term "person" in Section 202(1)(c). Read in the context of subsection 202(c), however, it is clear that the term could in no way apply to Plaintiff. Rather, the "plain and ordinary" language of Subsection 202(c) precludes discrimination with respect to the incidents of the employment relationship, e.g., by prohibiting greater monthly retirement benefits to male retirees than to female retirees. MCL 37.2202(1)(c); MSA

3.548(202)(1)(c). See also 37.2202, Historical and Statutory Notes (present language of Subsection 202 (1)(c) replaced "'an employee for purposes of an employee pension benefit plan or an employee welfare benefit plan, as defined in Section 3 of Title I of the federal employee retirement income security act").[6]

The second fallacy in Plaintiff's "plain and ordinary meaning" argument is that it imposes unlimited liability on employers for the acts of its employees, including off-duty acts occurring on premises controlled by another. Plaintiff's assertions present a case in point. Plaintiff's complaint is that Mr. Bennett grabbed her on two occasions, once in an AVI kitchen and once in an AVI stockroom, and either kissed her or attempted to kiss her. According to Plaintiff, because the kitchen and stockroom were her work environment (i.e., controlled by her employer, AVI), Ford subjected Plaintiff to a hostile work environment simply because Mr. Bennett worked for Ford.

The disconnect could not be clearer. In order to "discriminate against an individual with respect to . . . a term, condition or privilege of employment," MCL 37.2202(a); MSA 3.548(202)(a), the "employer" (Ford in this case) has to have control over that "term, condition or privilege of employment." AVI, not Ford, controlled the

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[6] Plaintiff exercises the same selective reading of MCL 37.2701; MSA 3.548(701) and MCL 37.2801; MSA 3.548 (801), interpreting them only as to alleged acts of employment discrimination. Again, Plaintiff pays no heed to the "placement or purpose [of these terms] in the statutory scheme." Shinholster, supra, 471 Mich at 548-549. Read in context, it is clear both provisions apply to all sections of Elliott-Larsen, not just employment. Eide v Kelsey-Hayes Co, 431 Mich 26, 31; 427 NW2d 488 (1988). Similarly, while Plaintiff characterizes "person" as an "undefined statutory term," it is defined, again in the context of all sections of Elliott-Larsen, not just Elliott-Larsen's employment provisions. MCL 37.2103(g); MSA 3.548(103)(g). Therefore, a "person" bringing suit may be someone or some entity denied or discriminated against in education, public accommodation, or some other non-employment relationship governed by Elliott-Larsen. The wording is therefore necessarily broader than it would be had these provisions been meant to apply only to employment claims.

kitchen and stockroom. (Appeal Apx 184a-185a). If Mr. Bennett entered that AVI kitchen or stockroom, he surely was as much a trespasser as if he had sneaked in the back door of the Burger King across from the Wixom Plant gates. If he grabbed and kissed a Burger King employee in her workplace, or Plaintiff in her's, he might be liable for tortious conduct and possibly guilty of criminal activity. In neither case, however, is there support in the statutory language (or in logic) for imposing liability on Ford under Elliott-Larsen.

This Court understood the clarity of the statutory language in holding that a plaintiff, like Plaintiff here, has to prove she was an "employee" (not just an "individual") as part of her *prima facie* case of hostile work environment sexual harassment. Specifically, Plaintiff has to prove all of the following five elements: (1) the employee belonged to a protected group; (2) the employee was subjected to communication or conduct on the basis of sex; (3) the employee was subjected to unwelcome sexual conduct or communication; (4) the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile, or offensive work environment; and (5) *respondeat superior*. Chambers v Trettco Inc, 463 Mich 297, 311; 614 NW2d 910 (2000) (emphasis added). Neither the trial court nor the Court of Appeals erred in holding that Plaintiff's claim against Ford failed because she was not an employee of Ford within the meaning of Elliott-Larsen.

B. Federal Case Law Does Not Support Plaintiff's Claim That She May Sue Ford Despite Ford's Lack Of Control Over Her Employment.

While Plaintiff claims the federal courts, including the Sixth Circuit Court of Appeals, would agree with her construction of Elliott-Larsen, that is not the case. The

United States Supreme Court, in Clackamas Gastroenterology Associates PC v Wells, 538 US 440; 123 S Ct 1673; 155 L Ed2d 615 (2003), recently confirmed that the common law element of control, including such factors as the employer's right to assign and supervise the employee's work performance and the provision of employee benefits, is the touchstone of whether an individual is an "employee" under the federal anti-discrimination statutes. 538 US at 445 and n5 (citation omitted). In an analysis equally applicable to Plaintiff's claim here that the plain meaning of "employee" under Michigan law is an "individual" employed by an employer, the Clackamas Court observed the federal statutes do not meaningfully define the standard but rather offer a "mere nominal definition that is completely circular and explains nothing." Id at 444.

Similarly, in Falls v Sporting News Publishing Company, 834 F2d 611 (1987), reh'g en banc den (CA 6, 1988), the Sixth Circuit rejected the very argument advanced by Plaintiff here. In Falls, the plaintiff attempted to bring an Elliott-Larsen claim against a publisher, The Sporting News ("TSN"), based on the plaintiff's arrangement with TSN to submit weekly columns. Among other arguments, he claimed he was "an individual" who could sue "an employer" under Elliott-Larsen, especially in light of Michigan's historical stance that "social legislation is liberally construed to ensure sweeping coverage." Id, 834 F2d at 613. The Sixth Circuit disagreed, holding that the question of whether plaintiff could sue TSN under Elliott-Larsen turned on whether he was an employee of TSN pursuant to the economic reality test. Id at 614.

The cases cited by Plaintiff do not dictate a departure from the economic reality or control tests. The federal cases Plaintiff cites, e.g. Christopher v Stouder Memorial Hospital, 936 F2d 870 (CA 6, 1991), address instances -- typically in the medical

professions -- where an "employer," without directly employing an individual, nevertheless controls that individual's access to employment opportunities, e.g., a scrub nurse who could not work for surgeons after the hospital revoked the nurse's privileges. Id, 936 F2d at 875. The Sixth Circuit recently questioned whether Christopher and similar cases retain any validity, in light of intervening United States Supreme Court opinions. Shah v Deaconess Hosp, 355 F3d 496, 500 (CA 6, 2004). In any event, the Sixth Circuit held in Shah that Christopher must be limited to those situations where a hospital or similar entity actually "affects" a plaintiff's "employment opportunities with third parties," i.e., the opportunity to work for that third party. Id.[7]

The other federal cases Plaintiff cites are to the same effect. For example, in Moland v Bil-Mar Foods, 994 F Supp 1061 (ND Iowa, 1998), the plaintiff was assigned by her employer, IBP, to work on the premises of Bil-Mar, the defendant employer. Id at 1066. While Bil-Mar did not directly employ the plaintiff, Bil-Mar had sufficient control over her employment opportunities with IBP to have the plaintiff removed from the work assignment on Bil-Mar's premises, a control that ultimately ended the plaintiff's IBP employment altogether. Id at 1073. Similarly, in Diana v Schlosser, 20 F Supp2d 348 (D Conn 1998), the defendant had to approve the plaintiff's assignment to work with the defendant, and could (and did) revoke its approval, resulting in a diminishment of plaintiff's job duties with her employer (and ultimately in her resignation). Id at 350.

Plaintiff admits Ford had no say over whether AVI gave Plaintiff (or could give Plaintiff) a job. Ford did not have approval rights over Plaintiff's presence on AVI's

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[7] Shah also addresses the conundrum arising from the courts' use of different tests including the economic reality test and the control test. Id at 499-500. No test adopted by the federal courts, however, follows the rule Plaintiff would have this Court adopt.

premises, nor was there any evidence Ford could affect Plaintiff's removal, promotion, demotion, salary or benefits at AVI. Ford had no control over Plaintiff's continuing relationship with AVI. (Appeal Apx 209a-214a, 221a-224a, 249a-272a; Cross-Appeal Apx 14b-23b, 25b-30b). Plaintiff's cases simply do not apply.

Finally, Plaintiff relies on King v Chrysler Corp, 812 F Supp 151 (ED Mo 1993). Offering little insight into its reasoning, the trial court in King expanded the medical line of cases (where the "employer" was not the plaintiff's employer but nevertheless controlled the plaintiff's access to employment opportunities) to a manufacturing plant context. While the court did not elucidate any facts regarding Chrysler's control over the plaintiff or her employment, it indeed concluded on whatever facts were before it that Chrysler had control over the plaintiff's work environment. Id at 153.

Unlike in King, it was undeniably AVI that controlled Plaintiff's work environment. AVI, and only AVI, controlled access to its cafeterias, and AVI prohibited all non-AVI employees, including Mr. Bennett, from entering AVI's stockrooms and kitchens where Mr. Bennett allegedly kissed (or tried to kiss) Plaintiff. Indeed, the only time Mr. Bennett would encounter Plaintiff, under AVI's rules, was if he chose to take his coffee break in an AVI cafeteria during break times when the cafeterias were filled with both AVI and non-AVI employees, much like the situation at the Burger King right outside the Wixom Plant where many Ford employees prefer to take their breaks. (Appeal Apx 178a-186a). Similarly, it was AVI that took action under its own sexual harassment policy, sending a human resources representative from its headquarters in Ohio, when Plaintiff had earlier complained about sexual harassment by another non-AVI employee at the Wixom Plant (and did so again when Plaintiff complained three years after-the-fact

about Mr. Bennett). (Appeal Apx 175a-177a, 229a-232a, 240a-242a, 275a, 278a-280a; Cross-Appeal Apx 34b-35b). And it was Plaintiff's AVI manager who told Plaintiff that Ford could not do anything to Plaintiff for reporting sexual harassment. (Appeal Apx 175a-177a).

In response to these dispositive facts, Plaintiff offered no evidence that Ford had the ability to affect her hiring, firing or promotion or otherwise direct or control her work. All she put forward was her raw speculation that she felt she might lose her job or lose an opportunity for Ford employment if she complained. But she admitted she knew of no one who lost their job at AVI or Ford for complaining, and that she has never attempted to apply for employment with Ford. (Appeal Apx 207a, 225a-228a). In short, Plaintiff's own admissions and testimony bar any conclusion contrary to the one reached by the trial court and affirmed by the Court of Appeals.

C. Plaintiff's Elliott-Larsen Claim Fails For The Additional Reason That She Did Not Provide Actual Or Constructive Notice.

Summary of the Argument

As the trial court held:

> The Court further finds, even assuming *arguendo* Defendant Ford was the Plaintiff's employer and even assuming *arguendo* that the alleged harassment was sufficiently severe and pervasive, the Plaintiff cannot establish a prima facie case because there is no question of fact that Defendant Ford did not have notice, either actual or constructive, of the alleged harassment so that it could take prompt, remedial action.

(Appeal Apx 14a). The Court of Appeals did not address this question, finding it unnecessary in light of its holding that Ford was not Plaintiff's employer.

Plaintiff admittedly did not report Mr. Bennett's alleged conduct to Ford, or even to her own employer, AVI. (Appeal Apx 393a). Plaintiff's own testimony confirmed that

she mentioned the alleged incidents only to two hourly AVI co-workers, who made no report. (Appeal Apx 193a-196a). In addition, Plaintiff admits no one witnessed the alleged incidents, eliminating the possibility of constructive notice, at least in terms of constructive notice as presently defined by the Michigan (and federal) courts. Therefore, even assuming for the sake of argument that Plaintiff had standing to sue Ford under Elliott-Larsen, she concededly failed to give Ford the reasonable notice necessary to invoke the *respondeat superior* element of her *prima facie* case.

Failing the established standard, Plaintiff asks this Court to depart from its previous opinions and those of the Court of Appeals. First, piecing together fragments of speculation, Plaintiff invites this Court to follow an attenuated thread that would find constructive notice based on allegations that someone else made an "off-the-record" complaint to someone (who in turn allegedly told someone else at some later point) about the same alleged harasser, all of which may have occurred either immediately before, at the same time as, or after the accused allegedly harassed Plaintiff. Moreover, the "off-the-record" complaint, if it was made, concerned alleged conduct toward the complaining employee, who worked with the accused. It did not mention Plaintiff, who worked elsewhere for a different employer.

Plaintiff also asks this Court to change the standard for imposing liability for hostile environment sexual harassment from one of *respondeat superior* to direct liability for negligence. In addition, Plaintiff argues for a departure from established *respondeat superior* principles because some social scientists have offered opinions that women are reluctant to complain about sexual harassment.

None of Plaintiff's arguments warrant departure from established standards.

Permitting liability to be imposed on theoretical possibilities rather than notice to the employer imposes an impossible standard. Employers, like Ford, who establish procedures for reporting -- and even invite employees to report via a company-funded hotline -- should be able to rely on these procedures. Employees, in turn, should be encouraged to use the procedures so that problems that do exist can be resolved and appropriate remedies imposed promptly, rather than hashed out years later through litigation.

1. Plaintiff Did Not Provide Notice Because She Admittedly Told No One In Management About Mr. Bennett's Alleged Conduct And No One Witnessed The Alleged Conduct.

To establish *respondeat superior*, Plaintiff must prove (1) she provided Ford with "reasonable notice," and (2) despite this reasonable notice, Ford failed to take prompt remedial action. Chambers v Trettco, supra, 463 Mich at 312-313. As this Court explained in Chambers, the "central question" in determining *respondeat superior* liability is "whether defendant failed to take prompt and adequate remedial action after receiving adequate notice that [the alleged harasser] was sexually harassing plaintiff." 463 Mich at 318-319 (emphasis added).

The court in Chambers explicated this "notice" standard by relying on a federal case, Perry v Harris Chernin Inc, 126 F3d 1010 (CA 7, 1997), which outlines the notice requirement with specificity. Chambers, 463 Mich at 319. The court in Perry held that the plaintiff did not provide notice because she did not report the conduct despite the availability of a complaint procedure (i.e., actual notice), and because no one witnessed the alleged perpetrator engaging in sexually harassing conduct toward the plaintiff (i.e., constructive notice). Perry, 126 F3d at 1014. The Perry court reasoned that, to impose

liability where the plaintiff did not report the conduct and no one witnessed it would amount to strict liability. Id.

Plaintiff denounces this analysis as "pure dicta" because there was no evidence in Chambers that the accused harasser had harassed others prior to Ms. Chambers. (Plaintiff's Brief at 25). Plaintiff is wrong. The standard Plaintiff has advocated in this case is exactly what this Court said in Chambers the law does not permit. Plaintiff's standard would amount to the imposition of strict liability because Plaintiff did not report Mr. Bennett's conduct in accordance with established procedures, nor was there a single witness to it. (Appeal Apx 187a-189a, 201a-203a, 393a). There was no actual notice. There was no constructive notice. Essentially, Plaintiff's position is that she had virtually no burden at all with respect to notice.

a. Plaintiff Admitted She Did Not Provide Actual Notice.

As this Court has held, a hostile environment sexual harassment violation "can only be attributed to the employer if the employer failed to take prompt and adequate remedial action after having been reasonably put on notice of the harassment." Chambers v Trettco, 463 Mich at 313. Moreover, the notice must be with respect to the particular plaintiff. Id at 318-319. Here, Plaintiff could not and did not adduce evidence of actual notice. Indeed, by the time Plaintiff filed her lawsuit (i.e., gave Ford "notice," in her words), Mr. Bennett had already been out of the workplace for over a year.[8]

[8] In a footnote, Plaintiff implies that her lawsuit, filed three years after the alleged incidents, constituted "actual notice" because Ford "has never taken appropriate remedial action against Mr. Bennett." (Plaintiff's Brief at 24 n6, emphasis by Plaintiff). By the time Plaintiff filed her lawsuit, however, Ford had long ago removed Mr. Bennett from the workplace. Whether Plaintiff views his removal as "discipline" or Ford characterized it as such is not the point. If Ford's action stopped further alleged misconduct, Ford took appropriate remedial action. See e.g. Star v West, 237 F3d

Under Elliott-Larsen, "actual notice" means a complaint or report to "higher management" that the plaintiff is being subjected to a sexually hostile work environment. Sheridan v Forest Hills Public Schools, 247 Mich App 611, 621; 637 NW2d 536 (2001), lv den, 466 Mich 888; 646 NW2d 475 (2002). Higher management means "someone in the employer's chain of command who possesses the ability to exercise significant influence in the decision-making process of hiring, firing, and disciplining the offensive employee." Id, 247 Mich App at 622. See also Jager v Nationwide Truck Brokers Inc, 252 Mich App 464, 475-476; 652 NW2d 503 (2002) (plaintiff's notice to manager who did not have decision-making authority over alleged harasser was inadequate), lv den 468 Mich 884; 661 NW2d 232 (2003). The rationale for this rule is obvious: Employers can only act through their agents, and agents can only act within the authority assigned to them. Because Plaintiff admittedly did not complain to higher management at Ford (or even AVI), she did not provide actual notice.

b. Plaintiff Did Not Provide Constructive Notice.

The only other way for Plaintiff to establish *respondeat superior* was by demonstrating that Mr. Bennett's alleged sexual conduct toward her was so pervasive as to "'give[] rise to the inference of knowledge or constructive knowledge'" that Plaintiff was being sexually harassed. Sheridan, supra, 247 Mich at 627, quoting McCarthy v State Farm, supra, 170 Mich App at 457. In Sheridan, the plaintiff argued the evidence that she was being sexually harassed was sufficiently pervasive because (1) there had

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1036, 1039 (CA 9, 2001) ("What is important is whether the employer's actions, however labeled, are adequate to remedy the situation"). Because neither Plaintiff nor her cohorts in litigation claim Mr. Bennett engaged in further alleged harassment after June 2000 when Ford removed him from the workplace, Ford fulfilled any arguable obligation, at least with respect to Plaintiff.

been two earlier complaints by others of sexual harassment by the same perpetrator, one of which was substantiated[9]; and (2) the plaintiff had herself raised generalized complaints to higher management that the perpetrator was "bothering" her. 247 Mich App at 627-628. These prior sexual harassment complaints concerning the same alleged perpetrator, coupled with the plaintiff's generalized complaints to higher management about the alleged perpetrator, were not constructive notice because they provided "no basis on which to conclude that sexual harassment relating to the plaintiff was occurring." Id at 628 (emphasis added).

Plaintiff undisputedly never lodged even generalized complaints about Mr. Bennett with Ford, "higher management" or otherwise. She did not even make a generalized reference to Mr. Bennett to her own employer's management, at least not until three years after the alleged conduct had ceased and she had decided to sue Ford. Indeed, Plaintiff did not complain to AVI even in generalized terms, despite having been invited by AVI to use AVI's complaint procedure on an earlier occasion. In that instance, after Plaintiff submitted a written statement detailing allegations of sexual misconduct by another non-AVI employee, AVI had the accused removed from AVI's work premises. (Appeal Apx 240a-242a, 278a-280a; Cross Appeal Apx 34b-35b).

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[9] The second complainant testified that she had tried to complain to her supervisor about sexual harassment, but the supervisor refused to listen. 247 Mich at 630-632 n1 (White, J., dissenting). The Sheridan employer thus did not attempt to investigate the second complaint until after Ms. Sheridan complained five years later. When the employer did finally investigate, it found the second complaint was also meritorious. 247 Mich App at 619 and n10. Applying the arguments advanced by Plaintiff here, it would follow that the Sheridan employer, having received and not investigated the second complaint, would be strictly liable to Ms. Sheridan and every other individual in the workplace for having failed to discover that the accused was a "serial harasser." This Court has unequivocally rejected this interpretation of Elliott-Larsen. Chambers, supra, 463 Mich at 313.

Moreover, Plaintiff cannot adduce evidence that Ford had any sort of constructive knowledge that Plaintiff was being harassed by virtue of the pervasiveness of the alleged conduct. By Plaintiff's own admission, her interactions with Mr. Bennett lasted no more than three to four weeks. (Appeal Apx 199a). As to the three or four alleged invitations to meet him at a Taco Bell, Plaintiff is certain no one overheard him although there were many other people around, nor were there any witnesses to the kiss and attempted kiss. (Appeal Apx 187a-188a, 202a-204a). Having not complained herself about unwitnessed conduct, Plaintiff did not provide actual or constructive notice.

2. Alleged "Reports" By "Others" Did Not Provide Constructive Notice Concerning Plaintiff.

Plaintiff makes the misleading argument that "Ford could be held at fault for Bennett's harassment of [Plaintiff] because it ignored prior reports of his severe sexual harassment of other women." (Plaintiff's Brief, at 24). Plaintiff's argument is misleading because it omits a dispositive fact about the Ford employees who made "prior reports" concerning Mr. Bennett: Plaintiff produced no evidence -- and there is no evidence -- that any Ford employee (much less multiple Ford employees) came forward before Mr. Bennett's alleged misconduct toward Plaintiff. It also ignores the rule under Elliott-Larsen that even a prior report by another employee claiming the same perpetrator engaged in sexual harassment toward that employee (as opposed to the plaintiff) does not alert the employer that the plaintiff is or may become a victim of sexual harassment. Sheridan v Forest Hills, supra, 247 Mich App at 627-628. This elementary concept is especially applicable in an enormous operation like the Wixom Plant (where Ford alone employed 3,500 employees in what was then the largest manufacturing facility in North America).

a. There Is No Evidence That Any Employee Complained About Mr. Bennett Before His Alleged Misconduct Toward Plaintiff.

In the instant case, most of the Ford employees who made "reports" concerning Mr. Bennett did so by filing lawsuits of their own -- long after Mr. Bennett allegedly engaged in sexual misconduct toward Plaintiff. And when they did make "reports" well after-the-fact, they alleged conduct by Mr. Bennett that was unwitnessed by anyone else, eliminating the potential for constructive notice. With the exception of Ms. Maldonado, who will be discussed separately, *infra*, Section C.2.b., the pertinent evidence concerning when and how these Ford employees "came forward," and what Ford could have possibly known concerning their complaints in the fall of 1998 when Plaintiff claims she was sexually harassed, is summarized here:

> A. Lula Elezovic: Ms. Elezovic claimed Mr. Bennett exposed himself to her on a single occasion in summer 1995 in a remote outdoor location at the Wixom plant. There were no witnesses. The lower courts held that Ford had no notice of alleged wrongdoing by Mr. Bennett toward Ms. Elezovic as a matter of law until she filed her lawsuit in November 1999, i.e., at least one year after Plaintiff's alleged encounters with Mr. Bennett in the fall of 1998. Elezovic v Ford, supra, 259 Mich App at 193-197.
>
> B. Pamela Perez: Ms. Perez also brought her own lawsuit. She alleged Mr. Bennett exposed himself on a single occasion in the summer of 1999, i.e., after the alleged events involving Plaintiff. There were no witnesses. Ford did not learn of this purported incident until June 2001, when Plaintiff's counsel mentioned her name in a deposition in Ms. Maldonado's lawsuit. (Appeal Apx 62a, 68a, 394a).
>
> C. Jennifer Cochran: Ms. Cochran claimed Mr. Bennett once handed her two $100 bills while she was working on a Wixom Plant assembly line, and said something about getting a hotel room. She thought he was joking and handed the money back. They both laughed. There were no witnesses to this exchange. Ford knew nothing about any interaction between Ms. Cochran and Mr. Bennett until June 2001, when Ms. Perez mentioned her in a deposition in Ms. Elezovic's lawsuit. (Appeal Apx 123a).

> D. Shannon Vaubel: Ms. Vaubel claimed Mr. Bennett once attempted to kiss her in her father's office at the Wixom Plant. There were no witnesses. Ford first learned of Ms. Vaubel's allegation in February 2000, when Ms. Vaubel gave a deposition in Ms. Elezovic's lawsuit. (Appeal Apx 106a-107a, 394a). [10]

Indeed, the only "report" Ford had received prior to fall 1998, when Plaintiff claims Mr. Bennett harassed her, was the 1995 report of Mr. Bennett's misdemeanor offense, which was not for sexual harassment, MCL 37.2103(i); MSA 3.548(103)(i), and was not notice of sexual harassment, see infra, Section C.2.c.

As is clear from the foregoing, Plaintiff presented no evidence of a single allegation concerning workplace sexual misconduct by Mr. Bennett that was relayed to Ford's management prior to Plaintiff's alleged encounters with Mr. Bennett in the fall of 1998. That Ford later learned of these allegations (largely through discovery in lawsuits) is immaterial, inasmuch as notice, by its very nature, may not be imposed in retrospect. It was only what was known to Ford before Mr. Bennett allegedly harassed Plaintiff -- not what Ford learned afterwards -- that could possibly constitute "notice."

b. Ms. Maldonado Did Not Provide Notice With Respect To Plaintiff.

Plaintiff asserts that Ford knew of Mr. Bennett's alleged misconduct vis-à-vis Ms. Maldonado before Mr. Bennett allegedly attempted to kiss Plaintiff, and that this knowledge in turn should serve as at least constructive notice to Ford concerning Plaintiff. There are at least three infirmities in Plaintiff's position. First, it is admittedly speculative that Ms. Maldonado complained to anyone prior to Mr. Bennett's alleged

[10] Because Plaintiff's arguments concerning these "reports" succeeded in misleading the Court of Appeals in Plaintiff's case, a visual timeline of the sequence of events before the trial court is attached as an addendum to this brief for the Court's convenience.

encounters with Plaintiff; second, Ms. Maldonado's complaints were not notice to Ford; and third, Ms. Maldonado's "complaints" were not notice concerning Plaintiff.

Plaintiff had to admit she is speculating as to whether Ms. Maldonado complained to anyone prior to "fall 1998," the fluid and undefined time period Plaintiff claims Mr. Bennett harassed her. Because it was pure speculation and surmise, it could not raise a genuine issue of material fact on this notice and timing question. Maiden v Rozwood, supra, 461 Mich at 123 (only "admissible evidence" can defeat summary disposition); Karbel v Comerica Bank, 247 Mich App 90, 96-98; 635 NW2d 69 (2001) (conjecture and speculation must be disregarded), lv den, 466 Mich 854; 643 NW2d 574 (2002). See also Mitchell v Toledo Hosp, 964 F2d 577, 584-585 (CA 6, 1992) ("subjective beliefs" cannot defeat summary judgment); Jameson v Jameson, 176 F2d 58, 60 (CA DC, 1949) ("Belief, no matter how sincere, is not equivalent to knowledge"). Stated otherwise, even a "best guess," because it is still a guess, can never be fact.

Plaintiff admitted she cannot say when Mr. Bennett allegedly kissed her or tried to kiss her, apart from inconsistent generalization. By her account, it was either at some indeterminate time as early as September 1998 (as alleged in her Complaints), or, as she "seemed to remember," possibly as late as Thanksgiving 1998, or possibly somewhere in between (as she "believed" in her deposition). (Appeal Apx 56a, 166a-167a, 189a-193a, 206a, 208a, 216a, 246a-248a, 275a, 288a, 362a-363a, 393a). Plaintiff's "best guess" as to timing cannot sustain her burden of proof on this point. See Mason v Wal-Mart Stores Inc, 91 SW3d 738, 743-744 (Mo App, 2002) (evidence of complaints by others irrelevant on issue of notice where there was uncertainty as to

whether complaints pre-dated harassment experienced by the plaintiff).

In addition to asking the Court to accept speculative timing as evidence, Plaintiff compounds her error here by encouraging this Court to accept her counsel's arguments -- rather than the record evidence -- that Ms. Maldonado had not only complained to Ford before Mr. Bennett's alleged misconduct toward Plaintiff, but that Ms. Maldonado had complained to "higher management officials" at Ford. (Appeal Apx 20a). Plaintiff's position is not supported by the record, and is not true. The record evidence establishes Ms. Maldonado did not complain to "higher management" concerning Mr. Bennett's alleged misconduct, either in late October 1998 or at any other time prior to December 1999 when she made an offhand reference to misconduct by Mr. Bennett when talking with a Labor Relations Representative about her holiday pay. (Appeal Apx 326a). Even then -- in December 1999, long after the events in Plaintiff's case -- she declined to cooperate with Ford's policy and procedures for sexual harassment complaints.

The record establishes that the most Ms. Maldonado did in late October 1998 (immediately before, during, or after the events in Plaintiff's case) was to have an impromptu conversation at her home with her uncle, Joe Howard. Ms. Maldonado places this alleged conversation on either October 22 or 29,1998, or sometime later, while Ms. Maldonado was off work from Ford on an extended medical leave. (Appeal Apx 311a-312a). While Plaintiff's counsel, in the course of argument, has repeatedly tried to promote Mr. Howard to "higher management," the uncontroverted evidence before the trial court was that Mr. Bennett and Mr. Howard were peers at Ford's Wixom Plant. Mr. Howard had no management authority over Mr. Bennett. (Appeal Apx 330a-

331a). Accordingly, Mr. Howard was not "higher management," as that term is defined under Michigan law, Sheridan v Forest Hills, supra, 247 Mich App at 622, and Mr. Howard did not report what his niece had said to anyone who was "higher management." (Appeal Apx 329a).[11] Indeed, Ms. Maldonado, in talking to her uncle did not do so for the purpose of notifying Ford of Mr. Bennett's alleged harassment. Rather, at most, it was her unspoken hope that her uncle would talk to his peer, Mr. Bennett. (Appeal Apx 312a, 326a).

On or about Friday, October 30, 1998, while still on medical leave, Ms. Maldonado testified she stopped by the Wixom Plant where she ran into a close friend, Dave Ferris, outside the Labor Relations office, and supposedly said something about Mr. Bennett's alleged misconduct toward her. Ms. Maldonado and Mr. Ferris were bar mates and late night swimming companions. Mr. Ferris had once been a supervisor at the Wixom Plant, i.e., a lower level employee than Mr. Bennett, but had not been steadily employed since beginning a series of medical leaves in 1994. When Ms. Maldonado ran into Mr. Ferris that day, he had no ongoing position or responsibilities for Ford. Instead, he was temporarily "loaned" to the Labor Relations office to help with overflow clerical work while he awaited the results of a third-party medical exam and negotiated a disability buy-out. He was not "higher management" (or management at all), nor was he a Labor Relations representative. (Appeal Apx 282a-283a, 340a-342a, 386a). Any conversation Ms. Maldonado had with Mr. Ferris was, at her insistence,

[11] Mr. Howard testified that he is certain he did not talk to his niece about Mr. Bennett until October 1999, at which time he still did not report anything to higher management. (Appeal Apx 328a-329a). For purposes of summary disposition, however, Ford accepted as true Ms. Maldonado's testimony concerning the timing of her conversation with her uncle.

between friends and off-the-record. (Appeal Apx 310a, 342a).

Sometime later, Mr. Ferris testified, he had a brief 30-second impromptu conversation with Labor Relations Supervisor Jerome Rush, in which he did not mention anything about exposure but allegedly mentioned Mr. Bennett. Mr. Ferris does not recall when this happened. (Appeal Apx 342a, 344a-345a, 385a). Presumably, if the conversation between Mr. Ferris and Mr. Rush actually occurred, it was after Ms. Maldonado allegedly ran into Mr. Ferris on October 30, 1998 (Appeal Apx 310a), meaning it was sometime between November 1998 and December 1998, when Mr. Ferris's disability buy-out took effect. Mr. Ferris could be no more specific than that. (Appeal Apx 339a, 342a-344a). Like Plaintiff and Ms. Maldonado, he could only guess.[12] Plaintiff cannot meet her burden by piling speculation upon speculation with respect to the timing of Ms. Maldonado's alleged "complaints" vis-à-vis Plaintiff's alleged encounters with Mr. Bennett.

In any event, the Court of Appeals has held, and properly so, that complaints by employees other than the plaintiff about alleged misconduct directed at them, and not the plaintiff, is not notice that the plaintiff is being subjected to a sexually hostile work environment. Sheridan, 247 Mich App at 627-628. This principle is especially applicable here. If Ms. Maldonado indeed experienced a problem with Mr. Bennett and reported it to Ford, why would that report provide any information to Ford about Plaintiff, who worked elsewhere (and for another employer) in an enormous manufacturing plant

[12] Before Mr. Ferris allegedly talked to Mr. Rush, he claims he spoke with Mr. Bennett. Mr. Ferris could only speculate as to how many days (or possibly weeks) passed between his alleged conversation with Ms. Maldonado on October 30, 1998 and his alleged talk with Mr. Bennett, who at the time was working a different shift than Mr. Ferris. (Appeal Apx 344a).

employing thousands of people? Ford has to have notice regarding Plaintiff's work environment. Chambers, supra, 463 Mich at 313, 318-319. Notice with respect to Ms. Maldonado's work environment, in an area of the Wixom Plant controlled by Ford, cannot possibly say anything about what is happening in Plaintiff's AVI-controlled work environment. Because Plaintiff admittedly did not give Ford reasonable notice, Ford was denied its right to promptly investigate and take whatever remedial action appeared warranted by the circumstances.

The reasoning underlying this principle is a sound one. Employers should have incentive to implement procedures for reporting perceived harassment, and employees should have incentive to use those procedures, so that problems can be resolved promptly. A rule of law that encourages employees to bypass internal procedures can only serve as a disincentive to implementing and administering an effective policy. It also transfers to the judicial system the burden of resolving workplace issues that can be more effectively resolved when and where they arise.

Ms. Maldonado's alleged complaints present a case in point. Had she used Ford's reporting process, rather than supposedly confiding in a relative and a friend with an admonition to keep it "off the record," Ford could have taken statements and presumably, if there was corroborating evidence or Ms. Maldonado otherwise proved credible, disciplined Mr. Bennett before there was an opportunity for alleged misconduct toward any other Ford employee or Plaintiff. Not only did Ms. Maldonado refuse to use Ford's procedure, she refused to make any timely report, even to her uncle and friend. Instead, her own tale is that she waited eight months, until she was on an extended medical leave for knee surgery, and thus unavailable for questioning. While Plaintiff

now implies Ms. Maldonado did not know to whom she could make a report, Ms. Maldonado's testimony was just the opposite. She admitted she knew, at a minimum, she could file a grievance for the UAW to take to Ford, but she was not ready to make a report. (Appeal Apx 310a). She also could have made a report through Ford's hotline (Cross-Appeal Apx 40b), anonymously, if she wished. In fact, when Ms. Maldonado finally did talk to a labor relations representative in December 1999, she still would not provide a statement. (Appeal Apx 326a). In her counsel's words, Ms. Maldonado allegedly encountered workplace misconduct that amounted to "indecent exposure . . . assault and battery . . . criminal sexual conduct in the fourth degree (if not attempted rape) . . . stalking, and . . . sexually induced reckless driving." (Plaintiff's Brief at 26). If so, it was Ms. Maldonado's choice to subvert Ford's procedures in favor of litigation. It was not the absence of any action by Ford that permitted any subsequent alleged misconduct.

c. Mr. Bennett's Conviction Was Not "Notice" That He Was Sexually Harassing Anyone At The Wixom Plant.

Plaintiff also argues that Mr. Bennett's subsequently expunged record for off-premises conduct involving individuals never employed by Ford was itself "sexual harassment" and therefore "notice" that Mr. Bennett would sexually harass employees in the workplace, particularly Plaintiff. The gist of Plaintiff's argument is really this: any time an employer receives information that someone claims one of its employees has engaged in impermissible off-premises conduct with non-employees in a presumptively anonymous situation, the employer is on permanent notice that the employee is also risking his employment – in a venue in which his identity is well known – to sexually

harass virtually every person he encounters. There is absolutely no authority for this illogical leap from off-duty off-premises conduct with strangers to the workplace. Indeed, the case law that has addressed this issue is to the contrary. See e.g. Tomson v Stephan, 705 F Supp 530, 536 (D Kan, 1989) (excluding evidence that defendant made sexual advances outside the employment setting because the advances were not made toward an employee: "Although the woman may have been the victim of an unwelcome sexual advance, she was not a victim of sexual harassment"). Accord Longmire v Alabama State Univ, 151 FRD 414, 417 (MD Ala, 1992) (Defendant's "activities outside the workplace are irrelevant" to determining existence of hostile work environment).

Plaintiff asserts that Ferris v Delta Air Lines, 277 F3d 128 (CA 2, 2001) holds to the contrary. It does not. Ferris did not change the requirement that an employer be on notice of a sexually hostile work environment. All Ferris said was that, while off-premises conduct generally cannot create a hostile work environment, off-premises conduct directed at a co-worker might have done so under the peculiar circumstances of that case. In fact, the circumstances in Ferris were so different from the circumstances involved in Mr. Bennett's misdemeanor conviction that Ferris actually emphasizes the fallacy of Plaintiff's position.

In Ferris, the plaintiff, a female flight attendant for Delta, was drugged and repeatedly raped by a male co-worker in the co-worker's hotel room while the two were on a lay-over in a foreign country. 277 F3d at 131-132. On an earlier foreign lay-over, the same co-worker had raped another female flight attendant in her hotel room. This flight attendant promptly reported the sexual assault to Delta. Id at 132. While on yet

another foreign trip, the co-worker had made sexually suggestive remarks to another female flight attendant, only to become belligerent and threatening when that flight attendant turned down his dinner invitation. That flight attendant also promptly reported her male co-worker to Delta. Id at 133-134.[13] On these facts, the court considered whether off-premises conduct could ever be considered to have occurred in a "work environment." In doing so, the court concluded that, in the limited and unusual circumstances before it, it could. Even in those extraordinary circumstances, however, "the question [was a] close [one]." Id at 135.

In language not cited by Plaintiff here for obvious reasons, the Court emphasized how narrow its holding really was:

> The circumstances that surround the lodging of an airline's flight crew during a brief layover in a foreign country in a block of hotel rooms booked and paid for by the employer are very different from those that arise when stationary employees go home at the close of their normal workday. The flight crew members repeatedly spend brief layovers in a foreign country with little opportunity to develop private lives in that place. Most likely they do not speak the local language. In all likelihood, they do not have family, friends, or their own residences there. Although it is not mandatory for them to do so, they generally stay in a block of hotel rooms that the airline reserves for them and pays for. The airline in addition provides them as a group with ground transportation by van from the airport to the hotel on arrival, and back at the time for departure. It is likely furthermore in those circumstances that the crew members will have no other acquaintances in this foreign place and will band together for society and socialize as a matter of course in one another's hotel rooms. Even though the employer does not direct its employees as to how to spend their off-duty hours, the circumstances of the employment tend to compel these results. In view of the special set of circumstances that surround such a foreign layover, we disagree with the

[13] Yet another female flight attendant was raped by this same co-worker while staying at the co-worker's home, an incident that also had been reported to Delta. Id at 133.

district court's conclusion.

Id (emphasis added).

Nothing about the events underlying Mr. Bennett's misdemeanor conviction suggested these events occurred in a "work environment" as that term is defined in Ferris. The three females who allegedly were "victims" vis-à-vis Mr. Bennett's expunged conviction were not temporarily in some foreign country where they had been sent as part of their job in the company of Mr. Bennett. They were not Mr. Bennett's co-workers. They were not employed by Ford at all. Whatever happened to them did not occur in their work environment, or in any work environment, and therefore could not constitute "a sexually hostile working environment," much less notice to Ford of "a sexually hostile working environment." Plaintiff's effort to minimize the critical distinction between her case and Ferris -- that Mr. Bennett's alleged prior misconduct involved strangers who were not Ford employees -- is transparent. In Ferris, the employer had notice that the perpetrator had sexually assaulted at least three other co-workers, two of them in the same circumstances the court held could constitute a "working environment" in the unique context of flight attendants on brief layovers in foreign countries. In fact, the court entitled this section of its opinion, "Delta's prior notice of Young's sexually abusive conduct with co-workers." Ferris, 277 F3d at 132. As the court further explained, "Delta had notice of Young's proclivity to rape co-workers. Id at 136 (emphasis added).[14]

[14] Plaintiff feebly attempts to analogize Ferris to the facts here by claiming that Mr. Bennett was performing duties for Ford at the time of the events leading to his conviction. This claim relies on the fact that Mr. Bennett, as a job "perk," was driving a Ford-owned vehicle (an M-10 car). The fact Mr. Bennett was in a Ford vehicle did not transform the three women he passed on the highway into co-workers or the highway

Simply put, what the Ferris court held was that Delta's knowledge that the perpetrator had raped co-workers gave rise to a duty to protect other co-workers who, by the nature of their job duties, might be placed with the perpetrator in the same circumstances as his prior victims, i.e., on overnight stays in foreign countries where the norm would be for them to "band together" with the perpetrator "for society and socialize as a matter of course in one another's hotel rooms." 277 F3d at 135. This narrow exception to the general rule that an employer cannot be responsible for off-duty, off-premises conduct is in no way on point with the facts here.

d. Federal Case Law Is Not Applicable And Would Not Require A Different Result.

In Chambers v Trettco, supra, this Court expressly rejected the federal court analysis in Faragher v Boca Raton, 524 US 775; 118 S Ct 2275; 141 L Ed2d 662 (1998) and Burlington Industries Inc v Ellerth, 524 US 742; 118 S Ct 2257; 141 L Ed2d 633 (1998), in which the United States Supreme Court had relieved a plaintiff of the burden

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itself in a workplace. In addition, Plaintiff relies on certain documents she claims Mr. Bennett was supposed to complete in exchange for the "perk." Plaintiff includes these documents in her appendix even though they were not properly part of the record below, and therefore are not properly part of the record here. Rather, Plaintiff attempted to improperly supplement the trial record by attaching these documents to her motion to reconsider the trial court's order granting summary disposition, representing to the trial court that she had already filed the documents with a prior pleading when, in fact, she had not. See Churchman v Rickerson, 240 Mich App 223, 233; 611 NW2d 333 (2000) (reconsideration motion properly denied where evidence "could have been presented the first time the issue was argued."). See also Charbeneau v Wayne County General Hosp, 158 Mich App 730, 733; 405 NW2d 151 (1987). Defendants timely objected to Plaintiff's attempt at supplementation. (Cross-Appeal Apx 43b-45b). In any event, the documents Plaintiff claims Mr. Bennett was supposed to have completed in exchange for driving the M-10 car in 1995, at the time of the events underlying his conviction, concern a 1987 Ford evaluation plan that pre-dated Mr. Bennett's employment (and that did not involve employees at Mr. Bennett's level or an assessment form) and the Wixom Plant's M-10 program in 1998 through 2000. Accordingly, even if Plaintiff's analogy had validity (it does not), her documents are irrelevant.

of establishing every element of her sexual harassment claim. Chambers, 463 Mich at 316. Under Michigan law, unlike federal law, it is the plaintiff's burden to prove vicarious liability, not the defendant's burden to disprove it. Id. On this issue, therefore, federal cases have no applicability. Nevertheless, even under the lesser notice burden imposed on plaintiffs under federal law, "pervasive" conduct sufficient to equate to constructive notice requires far more than the level of pervasiveness required to establish the mere existence of a sexually hostile environment. Rather, the sexually inappropriate conduct between the plaintiff and the accused must not only be "egregious," but also "numerous and concentrated." Adler v Wal-Mart Stores Inc, 144 F3d 664, 675 (CA 10, 1998). Accord, Ford v West, 222 F3d 767, 776 (CA 10, 2000).

Given the strong language used by this Court in rejecting federal law, Plaintiff's insistence on explicating federal cases under Title VII is disingenuous. Moreover, her representation that federal law is "unanimous" (Plaintiff's Brief at 30) in finding that prior complaints about the same supervisor constitute notice as a matter of law is spurious. Plaintiff relies primarily on three federal cases for this principle, but Plaintiff fails to inform the Court that in each of these cases the plaintiff herself gave notice that she believed she was being subjected to a sexually hostile work environment -- something Plaintiff here did not do. See, Dees v Johnson Controls World Services Inc, 168 F3d 417, 420 (CA 11, 1999); Hirase-Doi v US West Communications Inc, 61 F3d 777, 781 (CA 10, 1995); Munn v City of Savannah, 906 F Supp 1577, 1580 (SD Ga, 1995).[15]

[15] Plaintiff also string cites various cases for the same general proposition, that the employer's ignoring a prior complaint about the same harasser could make it liable for later incidents of harassment perpetrated by the same man upon other women. (Plaintiff's Brief at 30). These cases do not support so broad a principle. For example, the cited portion of Hurley v Atlantic City Police Dept, 174 F3d 95 (CA 3, 1999), does

As one court observed while examining federal hostile environment claims in the context of both Title VII and Elliott-Larsen, claims that might succeed under Title VII will often fail under Elliott-Larsen's notice requirements. Marquis v Tecumseh Prod Co, 206 FRD 132, 175-191 (ED Mich, 2002). While Ford submits that Plaintiff's claim would fail under either statute, it is the state standard that applies here. Plaintiff's utter failure to satisfy Elliott-Larsen's notice requirement -- actual or constructive -- is fatal to her claim.

e. Plaintiff's Remaining Arguments Seek To Change – Not Apply – Michigan Law.

Apparently wishing to avoid controlling Michigan precedent under Elliott-Larsen, Plaintiff's remaining arguments demand a change in – not application of -- Michigan law. In this regard, Plaintiff cites Hersh v Kentfield Builders Inc, 385 Mich 410; 189 NW2d 286 (1971) as an example of how the "common-law agency principles" adopted in Chambers v Trettco, supra, should be applied to hold an employer "liable for torts committed by [its employees] outside the scope of their employment if the master was 'negligent or reckless' . . . in the employment of improper persons. . . in work involving risk of harm to others." (Plaintiff's Brief at 27). Hersh has nothing to do with Elliott-Larsen.

Chambers held that, before an employer can be vicariously liable for a hostile work environment created by one of its employees, a plaintiff must establish "*respondeat superior*" by showing that the employer had actual or constructive notice

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not deal with any allegation against a "same harasser." Rather, the issue there was the admissibility of evidence that others had been subjected to a hostile environment created by others with regard to the employer's affirmative defense (i.e., the approach rejected in Chambers). 174 F3d at 110-111. With respect to the pre-Faragher and co-worker harassment cases cited by Plaintiff, these cases apply a negligence standard, not the *respondeat superior* standard this Court recognized in Chambers.

that the plaintiff was being sexually harassed but failed to take reasonable corrective action. 463 Mich at 313. This is the only basis for holding an employer liable for a hostile work environment because, in the absence of such notice, sexual harassment is "outside 'the scope of actual or apparent authority to hire, fire, discipline, or promote.'" Id at 311. In short, it is only such notice and subsequent inaction that allows the otherwise unauthorized act of an employee to be "attributed to the employer." Id at 313. As Chambers noted, this is based on the law of agency, which holds that an employer cannot be vicariously liable for acts that are outside the scope of the agent's actual or apparent authority, unless the employer receives notice of those acts and in some way approves or ratifies them. Wickstrand v Nelson, 273 Mich 393, 398-99; 263 NW 404 (1935).

Contrary to what Plaintiff suggests, Hersh did not impose vicarious liability on an employer for the tort of an employee under a *respondeat superior* theory. Hersh did not address *respondeat superior* at all. Rather, in Hersh the plaintiff sought to hold the employer liable for its own independent tort, i.e., allegedly violating its general duty to "exercis[e] reasonable care for the safety of [its] customers, patrons, or other invitees." 385 Mich at 412-13. That common law duty of reasonable care with respect to sexual harassment was not at issue in this case nor could it have been, because there is no common law duty imposing liability for sex discrimination. Hartleip v McNeilab Inc, 83 F3d 767, 778 (CA 6, 1996).[16] Rather, Ford's liability was governed entirely by a statute that this Court has held imposes fault under a *respondeat superior* standard, not under

[16] Ford addresses in detail the absence of a common law claim for employment discrimination in Ford's Brief on Appeal filed with the Court on February 22, 2005, at 25-31.

direct liability for negligence.

Perhaps unintentionally, Plaintiff candidly discloses the fault standard it would have this Court impose, which is that "Bennett posed a danger of creating a hostile work environment." (Plaintiff's Brief, at 31) (emphasis added). Chambers is clear, however, that Plaintiff must present evidence that Ford was "on notice," not that Mr. Bennett had some dangerous propensity, but that Plaintiff, in fact, was being harassed. 463 Mich at 313 ("[T]he violation can only be attributed to the employer if the employer failed to take prompt and adequate remedial action after having been reasonably put on notice of the harassment")(emphasis added).

Plaintiff also argues the notice standard set forth by Chambers and its progeny must change because social science has found "women do not report sexual harassment." (Plaintiff's Brief at 29). According to Plaintiff, women do not report harassment "because they fear they will not be believed and will instead suffer retaliation." (Id). In today's legal environment, which includes detailed anti-harassment policies and 800 numbers where employees can make anonymous reports (Cross-Appeal Apx 40b), as well as multi-million dollar verdicts, this argument is incredible. It is also patronizing and perpetrates a stereotype of women as helpless victims.

Moreover, this argument has nothing to do with Plaintiff, who previously reported sexual harassment to AVI, was believed, and was not retaliated against. To the contrary, AVI remedied the problem by having the offending individual (who, like Mr. Bennett, was not an AVI employee) permanently banned from the AVI premises. (Appeal Apx 240a-242a, 278a-280a).

Aside from the fact that Plaintiff in effect asks this Court to disregard Michigan

law, Plaintiff's position is troubling for another reason. Plaintiff's argument that a plaintiff should be excused from giving notice because women usually do not want to give notice would have profound implications for employers – and the justice system – in this State. Employers would have virtually no ability to rely on company policies and complaint procedures put in place to identify and promptly remedy sexual harassment, and would feel forced to discipline each employee accused of sexual harassment, regardless of the merits (or lack thereof) of the complaint. The potential for abuse is obvious. The unworkable nature of such a standard is also clear, discouraging rather than encouraging prompt resolution and remedial action where warranted. Plaintiff's argument is, in any event, one for the legislature, not this Court.

D. Plaintiff's Claim That Mr. Bennett's Alleged Conduct Substantially Interfered With Her Employment is Not Properly Before The Court And Is Without Merit.

Plaintiff also raises the issue of whether her encounters with Mr. Bennett, limited to a three-week time span, were severe or pervasive so as to "substantially interfere" with her employment. Neither the trial court nor the Court of Appeals addressed this issue, nor did Plaintiff raise the issue in her cross-application to this Court. The issue thus is not properly before the Court. MCR 7.302(G)(4)(a).

In any event, the conduct Plaintiff attributes to Mr. Bennett does not rise to the level of severity or pervasiveness that Michigan courts have held can constitute a sexually hostile work environment under Elliott-Larsen. In Radtke v Everett, 442 Mich 368; 501 NW2d 155 (1993), the Court held that "whether a hostile work environment exists should be determined by an objective reasonableness standard, not by the subjective perceptions of a plaintiff." Radtke, 442 Mich at 388.

Federal courts have been more specific in enumerating the factors to be

considered in determining whether a sexually hostile environment may have existed:

> Workplace conduct is not measured in isolation; instead, "whether an environment is sufficiently hostile or abusive" must be judged "by 'looking at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'"

Clark County School Dist v Breeden, 532 US 268, 270-271; 121 S Ct 1508; 149 L Ed 2d 509 (2001), quoting Faragher v Boca Raton, supra, 524 US at 787-788 and Harris v Forklift Systems Inc, 510 US 17, 23; 114 S Ct 367; 126 L Ed2d 295 (1993). See also Burnett v Tyco Corp, 203 F3d 980, 982 (CA 6, 1999), cert den, 531 US 928; 121 S Ct 307; 148 L Ed2d 246 (2000).

In Tyco, the plaintiff claimed she was subjected to a sexually hostile environment over a six-month period of time. During that time, the company's personnel manager made two sexually explicit comments to the plaintiff. The same manager, while regaling others in the room with a story about a woman he had just seen, placed a pack of cigarettes and a lighter inside the plaintiff's tank top and bra strap, leaving her exposed. Tyco, 203 F3d at 981. The same manager allegedly engaged in similar conduct towards other female employees, but the plaintiff was unaware of these other incidents at the time. Id. These combined instances, spanning such a short period of time, were not sufficiently severe or pervasive as a matter of law as to have objectively altered the terms and conditions of the plaintiff's employment. Id at 984-985. See also Adusumilli v City of Chicago, 164 F3d 353, 361 (CA 7, 1998) (repeated but isolated incidents of inappropriate touching, coupled with sexual comments and ogling the plaintiff's breasts,

lacked severity necessary to defeat summary judgment), cert den, 528 US 988; 120 S Ct 450; 145 L Ed2d 367 (1999).

Plaintiff claims that, because Mr. Bennett allegedly forcibly kissed her, she has established severe and pervasive conduct that substantially interfered with her employment under Radtke v Everett, supra. According to Plaintiff, this Court held in Radtke that "a single incident of forced kissing is sufficient to support a claim of a hostile work environment." (Plaintiff's Brief at 23). Plaintiff reads Radtke too broadly. In Radtke, the plaintiff, Ms. Radtke, alleged the co-owner, Dr. Everett, physically held her down on a couch, firmly placing his arm around her neck for approximately one-and-one half minutes. When Ms. Radtke physically managed to escape his grip, he grabbed her by the neck and tried to forcibly kiss her. It was five minutes before Ms. Radtke managed to escape the couch altogether. As a result of the owner's assault and battery, the plaintiff tendered her resignation. 442 Mich at 374-376. In this context, this Court held that "[a]lthough rare, single incidents may create a hostile environment – rape and violent sexual conduct are two possible scenarios." Id at 395 (emphasis by the Court).[17] There is no claim by Plaintiff here of conduct amounting to this level of severity.

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[17] The Court further held Ms. Radtke may have alleged sufficiently severe conduct because the perpetrator, Dr. Everett, was the owner, and thus the employer:

> Because the perpetrator of the alleged conduct was the employer, recourse to the employer was fruitless. The alleged conduct, combined with the reality that the employer was the perpetrator, permits this single incident to be sufficient to reach the jury. Although the same conduct perpetrated by a co-worker might not constitute a hostile work environment, when an employer in a closely knit working environment physically restrains an employee and

Here, Plaintiff alleges three, or at most four, polite attempts by Mr. Bennett to invite her to a Taco Bell after work, one forced kiss followed by a second attempted kiss, all within a three to four-week period. There was no repetition of any conduct after these brief encounters. Mr. Bennett was not her employer or even employed by her employer. Plaintiff herself did not subjectively consider the alleged conduct to be of sufficient severity to characterize it as a sexual assault. (Appeal Apx 219-220a). Unlike Ms. Radtke, Plaintiff did not resign. To the contrary, she did not miss a single day of work or lose any money because of the alleged incidents. (Cross-Appeal Apx 6b-7b, 31b). Moreover, Plaintiff never reported any of these incidents for almost a three-year period. These incidents, if they occurred, were objectively insufficient to create a hostile work environment as a matter of law. Accordingly, should the Court decide to review this issue despite Plaintiff's failure to include it in her cross-application, it provides an additional reason for affirming the trial court's ruling. See Peterfish v Frantz, 168 Mich App 43, 53-54; 424 NW2d 25 (1988).

E. The Trial Court Did Not Abuse Its Discretion In Striking References To Mr. Bennett's Expunged Misdemeanor Conviction.

Finally, Plaintiff lodges misleading criticism of a trial court ruling concerning Mr. Bennett's conviction. Specifically, Plaintiff criticizes the trial court's holding that "'[t]he facts out of which the conviction arose occurred outside of the workplace and thus the behavior could not have caused or been notice of an offensive working environment.'"

> physically attempts to coerce sexual relations, the totality of the circumstances permits a jury to determine whether defendant's conduct was sufficient to have created a hostile work environment.

Id at 395-396 (emphasis by the Court).

(Plaintiff's Brief at 31). Plaintiff's criticism is misleading because she fails to advise the Court that this holding was made in the context of Mr. Bennett's motion to strike references to his conviction from Plaintiff's complaint.

Specifically, in response to Mr. Bennett's motion to strike, following a lengthy hearing and additional briefing, the trial court ruled,

> Finally, the Court finds, based on the fact that Defendant Bennett's conviction has been set aside, that it is not proper for the Plaintiff to include information about his conviction in her Complaint. This does not necessarily preclude the Plaintiff from pursuing her claim of negligent retention. Furthermore, at this time, the Court has not ruled that the Plaintiff is precluded from introducing into evidence information regarding that conviction since that issue is not before the Court.

(Appeal Apx 32a). The trial court's ruling is reviewed only for an abuse of discretion. Jordan v Jarvis, 200 Mich App 445, 452; 505 NW2d 279, lv den 443 Mich 879; 506 NW2d 872 (1993).

After Mr. Bennett filed the motion to strike, but before the trial court ruled, his conviction was expunged by order dated November 9, 2001. (Appeal Apx 84a). It was this expungement order on which the trial court relied in granting the motion to strike. (Appeal Apx 32a). Moreover, the scope of the relief granted by the trial court was narrow. After reviewing the statutes governing expungement orders, the court only struck references to the expunged misdemeanor conviction. The trial court did not prohibit Plaintiff from making reference to the facts underlying the conviction.[18] The court did not even prohibit Plaintiff from referring to the conviction in subsequent court filings, provided Plaintiff first filed any such papers with the trial court. Indeed, Plaintiff

[18] Indeed, Plaintiff seized every opportunity to argue those underlying facts in briefs and oral argument. (See e.g., Appeal Apx 368a, 392a, 395a-396a).

relied on the conviction as a basis for opposing summary disposition, and the trial court noted that reliance. (Appeal Apx 11a-12a). And, as the trial court expressly stated, it did not rule on the admissibility of the conviction at trial. (Appeal Apx 32a). That issue was never raised with or briefed for the trial court, and thus is not properly before this Court.

That Plaintiff does not even mention that the trial court's holding was in the context of the motion to strike and that the basis for the ruling was the expungement, demonstrates Plaintiff's real purpose, which is to convince this Court it should take away from the trial court the discretion to make evidentiary rulings in the first instance. Plaintiff's position is unprecedented.

It is the trial court that must be afforded the first opportunity to rule on admissibility because it is that court that "has the responsibility to control the introduction of evidence and the arguments of counsel and limit them to relevant and material matters." Tobin v Providence Hosp, 244 Mich App 626, 640; 624 NW2d 548 (2001). Only after the trial court rules on the evidence may that ruling be subjected to appellate review. Even then, relief is not warranted "'unless refusal to take this action appears . . . inconsistent with substantial justice' or affects 'a substantial right of the [opposing] party.'" Craig ex rel Craig v Oakwood Hosp, 471 Mich 67, 76; 684 NW2d 296 (2004). The Court of Appeals did not take Plaintiff's bait when she made the same misleading arguments there:

> As both defendants correctly point out, the trial court made clear that it was not ruling on the admissibility or exclusion of the facts or evidence underlying Bennett's conviction. Indeed, as defendant Ford notes, the trial court allowed plaintiff to include facts about Bennett's conviction in her response to defendants' joint motion for summary

disposition.

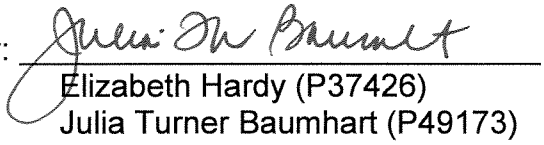
(Appeal Apx 23a). Because the trial court never ruled on the issue of admissibility, there is nothing for this Court to review. Accordingly, the trial court did not abuse its discretion in granting Mr. Bennett's motion to strike, nor did it err in dismissing Plaintiff's Elliott-Larsen claim.

IV. RELIEF REQUESTED

Ford respectfully requests that the Court deny Plaintiff's Cross-Appeal and affirm in full the order of the trial court.

Respectfully submitted,

KIENBAUM OPPERWALL HARDY & PELTON, P.L.C.

By: 

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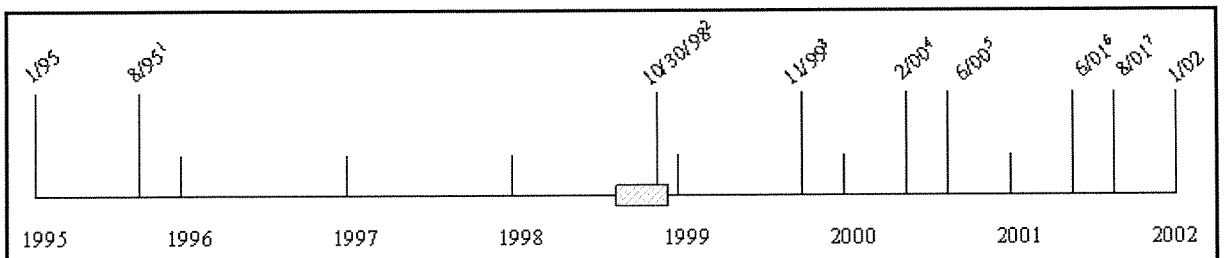
Dated: March 29, 2005

ADDENDUM TO BRIEF ON CROSS-APPEAL



1= 8/95: Ford notified of events leading to Mr. Bennett's misdemeanor conviction

▨ = Fall 1998: Period during which Plaintiff alleges she encountered Mr. Bennett over an indeterminate three-week period

2= 10/30/98: Approximate date Justine Maldonado alleges she talked to Joe Howard, David Ferris about Mr. Bennett

3= 11/99: Lula Elezovic notifies Ford of allegations against Mr. Bennett by filing lawsuit

4= 2/00: Shannon Vaubel testifies in deposition in Elezovic lawsuit that Mr. Bennett once attempted to kiss her

5= 6/00: Ms. Maldonado files lawsuit

6= 6/01: Pamela Perez' and Jennifer Cochran's names identified for first time in depositions in Elezovic lawsuit

7= 8/01: Plaintiff's counsel first identifies Plaintiff as someone allegedly harassed by Mr. Bennett